IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13-06-2005

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA

WRIT PETITION NO.374 OF 1998

Marine Container Services
(South) Private Limited,
18, Swami Sivananda Salai,
Chennai 600 005. .. Petitioner

Vs.

1. Deputy Commissioner of Customs,
(Manifest Clearance Department)
Custom House, Chennai 600 001.

2. Union of India, rep. by Joint
Secretary to Govt., Ministry of
Finance, Department of Revenue,
New Delhi 110 001. .. Respondents

Petition filed under Article 226 of the Constitution of India for the issuance of writ of Certiorari calling for records in order No.232/97 dated 18.2.1997 of the 2nd respondent confirming penalty of Rs.2,50,000/- on the petitioner and quash the same.

For Petitioner : Mr.T.K. Ramkumar

For Respondents : Mr.S. Udayakumar, ACGSC

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J U D G M E N T

The petitioner has challenged the order dated 18.2.1997 passed by the second respondent imposing penalty under the following circumstances :-

The petitioner carries on business as a steamer agent for several foreign and Indian ship owners and particularly for M/s. Bengal Tiger Lines, which operates common feeder shipping services between Madras/Singapore and Madras/Colombo. The feeder services are utilised by various shipping lines for transhipping loaded containers from Singapore/Colombo to Madras and from Madras to

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Singapore/Colombo. On the particular occasion, the petitioner has acted as steamer agent for the vessel Tiger Bridge owned by M/s. Bengal Tiger Lines. For International shipping traffic, the main ports of call in South Asia are Colombo and Singapore. Cargo bound for other ports are discharged at these ports and transhipped through feeder vessels. The main liner carrier however remains contractually liable to the consignor/consignee for performance of the entire contract and for issuance of Bill of Lading for the entire voyage. The transhipment from Singapore/Colombo to Madras is based on a separate contract of carriage between the Main line carrier and the petitioner's principals. In course of such operations, the petitioner's principal's vessel m.v Tiger Bridge in its voyage No.189 arrived at Madras on 10.2.1992 with loaded containers belonging to various main line carriers. As per the practice prevailing at the Port of Madras and as per the requirements of Customs Act and Major Port Trust Act, the Import General Manifests relating to particular articles were filed by M/s. Prabhu Shipping Services Pvt. Ltd., covering the disputed cargo of one carton of spares for caterpillar equipment under Line No.671 of the Manifest for which NTR Container Lines Inc., Panama issued Bill of Lading. After discharge of various cargos including the disputed cargo, the container under Line No.671 remained unclaimed for a long period. Subsequently, when the container was destuffed by the Madras Port Trust, one carton of spares for caterpillar equipment was found to be short. Thereafter, the Assistant Collector of Customs, issued Show Cause Memo No.00475 dated 20.10.1993 calling upon the petitioner to show cause as to why penalty should not be levied under Section 116 of the Customs Act for short landing of one package under Line No.671 of the Import Manifest. The petitioner forwarded the Show Cause Memo to M/s. Prabhu Shipping Services Pvt. Ltd., on the footing that the subject cargo was covered by Bill of Lading issued by NTR Container Lines Inc., and the Manifest had been filed by their agent, namely, M/s. Prabhu Shipping Services Pvt. Ltd.. However, no reply was filed taking any particular stand either by the petitioner or by M/s. Prabhu Shipping Services Pvt. Ltd. The Assistant Collector of Customs by order dated 29.3.1995 imposed penalty of Rs.3,33,080/- because of the shortlanding of one package as no reply had been submitted.

2. Appeal was preferred by the petitioner with the Collector of Customs, who by his order dated 12.6.1995 remanded the matter for fresh disposal. The only ground on which the order of remand was passed is to the effect that Line No.671 was covered by Import Manifest filed by M/s. Prabhu Shipping Services Pvt. Ltd., and therefore, accountability for the shortlanding lies on M/s. Prabhu Shipping Services Pvt. Ltd., which aspect has not been considered by the lower authority. Thereafter, the original authority took up the matter for fresh disposal. The present petitioner appeared

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through Advocate and contended that delivery order for clearance of the cargo was issued by M/s. Prabhu Shipping Services Pvt. Ltd., and the petitioner was not concerned with the cargo under Line No.671. It was further contended that as per the Madras Port tally sheet the Container No.ITLU 6746240 covered by Line No.671 was landed with seals in tact. The subject consignment was stuffed by the shippers into the containers at their premises and the container was carried by the ship on Full Container Load (FCL) terms. The petitioner's responsibility was not involved as the ship was not party to the stuffing of the cargo into the container and on such basis, proceedings should be dropped against the petitioner.

3. The original authority considered two issues, namely, whether there had been any shortlanding of the goods and whether the liability for shortlanding was of the petitioner or of M/s. Prabhu Shipping Services Pvt. Ltd., which has filed the cargo declaration. The authority took note of the contention of the petitioner that the Manifest clearly shows that the container has FCL and the tally sheet indicated that the container had landed with seals intact, and therefore, there is no liability of the petitioner. The original authority, by relying upon Section 116 of the Customs Act and another decision of the Commissioner (Appeals), came to the conclusion that as per Section 116 of the Customs Act penalty is leviable on the person in charge of the conveyance and not on any other person and the steamer agent is considered as the person in charge of the conveyance, and therefore, the steamer agent is liable. Accordingly, the original authority imposed penalty of Rs.3,33,080/-. Thereafter, the petitioner filed appeal. The appellate authority modified the penalty amount as Rs.2,50,000/-, but observed that such penalty is to be paid by the present petitioner in view of the provisions contained in Section 116 of the Customs Act. The petitioner filed Revision before Respondent No.2, which has been dismissed under the impugned order.

4. The main contention raised by the petitioner is to the effect that since the transhipment was of Full Container Load and the seals were intact, the steamer agent, namely, the petitioner, cannot be held responsible.

5. Section 116 of the Customs Act is to the following effect :-

> "116. Penalty for not accounting for goods
>
> If any goods loaded in a conveyance for importation into India, or any goods transhipped under the provisions of this Act or coastal goods carried in a conveyance, are not unloaded at their place of destination in India, or if the quantity unloaded is

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short of the quantity to be unloaded at that destination, and if the failure to unload or the deficiency is not account for to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs, the person-in-charge of the conveyance shall be liable,-

(a) in the case of goods loaded in a conveyance for importation into India or goods transhipped under the provisions of this Act, to a penalty not exceeding twice the amount of duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been imported;

(b) in the case of coastal goods, to a penalty not exceeding twice the amount of export duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been exported."

6. A perusal of the aforesaid provision makes it clear that if the quantity unloaded is short of the quantity to be unloaded at the destination and the deficiency is not accounted for to the satisfaction of the Assistant Collector of Customs, the person-in-charge of the conveyance shall be liable for the penalty.

7. In the present case, the revisional authority by considering the fact that transhipment was of FCL / LCL basis, relying upon a Bombay High Court decision reported in 1986 (25) E.L.T.948 (Bombay) (SHAW WALLACE & CO. LTD. v. ASSISTANT COLLECTOR OF CUSTOMS & OTHERS), has come to the conclusion that in the present case, the transhipment was not merely FCL, but it was FCL/LCL and since at the time of unloading of LCL container, seals were intact and such seals were intact even at the time of destuffing of the container, the carrier was responsible.

8. The Bombay High Court decision has laid down the following prepositions in respect of Cargo brought in container :-

"(a) Cargo brought in container.

F.C.L. Container (Full Container Load)

(1) A full container load when unloaded from the vessel and the seals are found intact, then the vessel owner shall not be held responsible for any short landing or be made liable to pay penalty.

(2) In case where the seal is found broken, the survey report will be prepared of the contents of such container in the presence of Customs Officer and this survey should be carried out within 72 hours after the

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container is unloaded and seal is found broken. The Customs Officer and the Port Trust authorities should ensure that the container is re-sealed after completion of the survey reports of the contents. Any shortage noticed in such survey report will have to be accounted for by the carrier and the liability for such shortage will be solely of the carrier.

(b) L.C.L. Container (Less Container Load)

(1) At the time of unloading of the L.C.L container, if the seals are intact and again at the time of de-stuffing the container, the seals are found intact, then the carrier should be responsible to account for the difference between the manifested quantity and the de-stuffing tally.

(2) In case, the seals of the L.C.L. containers at the time of unloading are found to be intact, but are broken or tampered with at the time of de-stuffing then the responsibility for difference between the manifested quantity and de-stuffing quantity would be that of the Port Trust authorities and not of the carrier."

9. In the present case, it appears that the authorities have considered that it was not a clear case where the cargo had been brought in Full Container Load and on the other hand at the time it was unloaded at Madras, it had assumed the character of Less Container Load and since seals were found intact at the time of unloading and at the time of destuffing, the carrier was found responsible. This conclusion is based on certain factual conclusions. In the absence of any apparent error in such factual conclusions, it is difficult to come to a different conclusion while deciding the matter under Article 226 of the Constitution.

10. It is also important to notice that even though an opportunity of show cause had been given, the present petitioner had not taken any specific stand explaining the matter and it had only forwarded the show cause notice to M/s. Prabhu Shipping Services Pvt. Ltd., merely because, according to the petitioner, explanation was to be given by M/s. Prabhu Shipping Services Pvt. Ltd. Even after the matter was remanded, it was never contended in specific terms that transhipment was on FCL basis throughout and it was never specifically contended that at Singapore the Full Container Load container was again transhipped through the present petitioner. The original authority as well as the appellate authority and the revisional authority have considered the relevant aspects and have come to a definite conclusion. The factual conclusion arrived at by them cannot be said to be perverse warranting any interference. On the basis of such factual conclusion, it is apparent that Section 116 of the Customs

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Act was applicable and imposition of penalty on the petitioner cannot be said to be illegal.

11. In view of the above discussion, the writ petition is liable to be dismissed. However, the issue as to whether the short fall was on account of the petitioner's default or on account of the default of M/s. Prabhu Shipping Services Pvt. Ltd., is a matter between the petitioner and M/s. Prabhu Shipping Services Pvt. Ltd., and it would be open to the petitioner to recover the amount from M/s. Prabhu Shipping Services Pvt. Ltd., by proceeding in accordance with law.

12. With the above observation, the writ petition is dismissed. No costs.

Sd/

Asst.Registrar

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Sub Asst.Registrar

dpk

To

1. Deputy Commissioner of Customs,
   (Manifest Clearance Department)
   Custom House, Chennai 600 001.

2. The Joint Secretary to Govt.,
   Union of India, Ministry of
   Finance, Department of Revenue,
   New Delhi 110 001.

1 cc to Mr.S.Udayakumar, S.C.G.S.C., SR.No. 23679
1 cc to Mr.T.K. Ramkumar, Advocate, SR. 23738

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